

**Aroostook County Regional Ophthalmology Center  
and Jacquelyn Shepard and Sheila Lamoreau.**  
Cases 1-CA-29433 and 1-CA-29434

January 8, 2001

**SUPPLEMENTAL DECISION AND ORDER  
BY CHAIRMAN TRUESDALE AND MEMBERS  
LIEBMAN  
AND HURTGEN**

On April 28, 1995, the National Labor Relations Board issued a Decision and Order in this proceeding, in which it ordered the Respondent, *inter alia*, to make whole Jacquelyn Shepard and Sheila Belle-Isle (formerly Lamoreau), for any loss of earnings they may have suffered as a result of the Respondent's unfair labor practices against them in violation of Section 8(a)(1) of the Act. 317 NLRB 218. On April 12, 1996, the United States Court of Appeals for the District of Columbia Circuit entered its judgment enforcing the Board's Order in relevant part. *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996). A controversy having arisen over the amount of backpay owed by the Respondent to Shepard and Belle-Isle under the Board's Order as enforced, the Regional Director for Region 1 issued a compliance specification and notice of hearing alleging the amounts of backpay due and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. The Respondent subsequently filed an answer and an amended answer to the compliance specification.

On February 28, 2000, the General Counsel filed with the Board a Motion to Strike Portions of Respondent's Answer to the Compliance Specification and for Partial Summary Judgment, with exhibits attached. On March 1, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On March 15, 2000, the Respondent filed an answer to the Notice to Show Cause, Opposition to General Counsel's Motion to Strike and for Partial Summary Judgment, and Motion to Further Amend Answer to Compliance Specification, with exhibits attached.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following  
Ruling on Motion to Strike Portions of Respondent's  
Answer to the Compliance Specification and for  
Partial Summary Judgment

The General Counsel moves to strike those parts of the Respondent's amended answer (answer) to the compliance specification (specification) that attempt to relitigate matters that were raised in the underlying unfair labor

practice proceeding or that fail to meet the specificity requirements of Section 102.56(b) of the Board's Rules and Regulations. The General Counsel further moves for partial summary judgment on those allegations of the specification that the Respondent has admitted and on those allegations for which the Respondent has answered with denials that the General Counsel moves to strike.

**I. THE ALLEGED ATTEMPT TO RELITIGATE  
MATTERS DECIDED IN THE UNFAIR LABOR  
PRACTICE PROCEEDING**

The General Counsel contends that the Respondent is attempting to relitigate issues that were litigated and decided in the unfair labor practice proceeding by denying in its answer that it discriminated against Shepard and Belle-Isle, affirmatively asserting that backpay to Shepard and Belle-Isle is barred by Section 10(c), and affirmatively asserting that the two employees quit for reasons unrelated to the exercise of Section 7 rights, and that they, therefore, would not have received any Christmas bonuses in 1992, 1993, 1994, and 1995. The General Counsel argues that the Respondent is barred from raising these defenses at the compliance stage of the proceeding and that all parts of its answer that raise these issues should be stricken.

*A. The Denial of Discrimination*

With respect to the Respondent's denial that it discriminated against Shepard and Belle-Isle, the Respondent asserts in its response to the Notice to Show Cause that neither the text of Section 8(a)(1), nor the D.C. Circuit's decision enforcing the Board's order in part, contain the term, "discrimination." The Respondent contends that it is, therefore, entitled to object to the Board's use of the term in the specification. We disagree. Although the text of Section 8(a)(1), unlike that of Section 8(a)(3), does not contain the term "discrimination," the Board nevertheless uses the term when remedying violations of Section 8(a)(1). See, e.g., *A. Duie Pyle, Inc.*, 263 NLRB 744, 748, 756 (1982), enf. denied on other grounds 730 F.2d 119 (3d Cir. 1984). Accordingly, we grant the General Counsel's motion to strike those portions of the Respondent's answer denying that it discriminated against Shepard and Belle-Isle.

*B. The Assertion that Backpay is Barred by Section 10(c)*

The D.C. Circuit did not affirm the Board's finding that the Respondent violated Section 8(a)(1) by terminating Shepard and Belle-Isle. The Respondent argues that because the court found nothing unlawful in the terminations of Shepard and Belle-Isle, the two employees were discharged for cause and Section 10(c),<sup>1</sup> therefore, bars a

<sup>1</sup> Sec. 10(c) provides in relevant part that:

backpay remedy. The General Counsel contends that the Respondent is attempting to relitigate the issue of whether it has an obligation to make Shepard and Belle-Isle whole.

While it is true, as the Respondent asserts, that the D.C. Circuit found nothing unlawful in the terminations of Shepard and Belle-Isle, the court affirmed the Board's finding that the Respondent's conditions for rehiring the two employees violated Section 8(a)(1). The backpay remedy at issue here is for the unlawful offers of rehire, not for the terminations. By arguing that Section 10(c) bars a backpay remedy, the Respondent attempts to relitigate the lawfulness of, and the appropriate remedy for, the unlawful offers of rehire. This matter was already considered and decided at the unfair labor practice proceeding and, therefore, cannot be relitigated at the compliance stage of the proceeding. *Emsing's Supermarket*, 299 NLRB 569, 571 (1990); *Hiysota Fuel Co.*, 287 NLRB 1, 3 (1987). Accordingly, we grant the General Counsel's motion to strike the Respondent's answer concerning the Section 10(c) bar to backpay.

*C. The Assertion that Shepard and Belle-Isle Quit for Reasons Unrelated to the Exercise of Section 7 Rights*

In its response to the Notice to Show Cause, the Respondent moves to amend its answer to the specification by deleting from paragraphs 11(a) and 12(a) the statement: "Shepard/Belle-Isle quit Respondent's employ on or about May 30, 1992, for reasons unrelated to the exercise of Section 7 rights." The Board has held that a respondent may amend its answer before a compliance hearing by a response to the Notice to Show Cause. See, e.g., *Ellis Electric*, 321 NLRB 1205, 1206 (1996). We grant the Respondent's motion to delete from its answer the assertion that Shepard and Belle-Isle quit the Respondent's employ. Through this amendment, the Respondent now admits paragraphs 11(a) and 12(a) of the specification.<sup>2</sup> Further, the Respondent's denial of paragraph 5 of the specification concerning Christmas bonuses was based on its assertion that Shepard and Belle-Isle had not remained employed by the Respondent. The Respondent's amendment of its answer to paragraphs 11(a) and 12(a), therefore, results in an admission of paragraph 5.

---

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

<sup>2</sup> In light of this ruling, we deny the General Counsel's motion to strike these portions of the Respondent's answer.

**II. THE SPECIFICITY OF THE RESPONDENT'S ANSWER TO THE ALLEGATIONS CONCERNING THE ANNUAL \$1-PER-HOUR PAY RAISE**

The General Counsel contends that paragraph 3 of the specification, alleging that the Respondent gave a \$1-per-hour pay raise to its registered nurses each year on their anniversary date, should be deemed to be admitted as true because the Respondent's answer fails to meet the specificity required by Section 102.56(b) of the Board's Rules and Regulations.<sup>3</sup> In its response to the Notice to Show Cause, the Respondent attaches letters to the Compliance Officer in Region 1, dated November 19, 1996, and April 4, 1997, that contain a summary of raises given to its employees from 1990 forward and assert that the summary does not support the conclusion that all registered nurses received raises on their anniversary dates or that Shepard and Belle-Isle would have received raises of \$1 per hour on their anniversary dates. The Respondent requests that the content of these letters be incorporated into the Respondent's answer to the specification. In accord with *Ellis Electric*, supra, we grant this request. We find that the Respondent's answer, so amended, meets the specificity requirement of Section 102.56(b) of the Board's Rules and Regulations.

**III. THE ASSERTION THAT THE WOOLWORTH FORMULA FOR CALCULATING BACKPAY SHOULD NOT BE USED IN THE CIRCUMSTANCES OF THIS CASE**

The General Counsel moves to strike paragraphs 7, 8, 10, 11, 12, and 20(c)(i), (ii), and (iii) of the Respondent's answer to the specification on the ground that they deny that the *Woolworth* formula<sup>4</sup> for calculation of backpay on a calendar quarterly basis is appropriate or define net interim earnings differently from the *Woolworth* definition of such earnings. The General Counsel contends that the Respondent has not given any valid reason why this case differs from the *Woolworth* case. He further argues that the Respondent is foreclosed from attacking the use of the *Woolworth* formula at the compliance stage of this proceeding because it failed to contest the use of the formula before the Board or the D.C. Circuit.

---

<sup>3</sup> Sec. 102.56(b) requires that:

As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the Answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

<sup>4</sup> *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

The Board has generally applied the *Woolworth* formula for calculating backpay on a quarterly basis since 1950 with court approval. See *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344 (1953) (Board's use of the *Woolworth* formula is an appropriate exercise of its discretion.). The Respondent contends that although the Court upheld the Board's use of the *Woolworth* formula in *Seven-Up*, it also assumed that the Board would adapt the formula to varying circumstances. *Id.* at 348. It argues that the circumstances of the instant case warrant an adaptation of the *Woolworth* formula. Thus, the Respondent argues that it offered rehire to Shepard and Belle-Isle immediately after terminating them for lawful reasons. With respect to the unlawful conditions for rehire, the Respondent argues that it did not intend to violate federal law. Instead, the Respondent intended to prevent a recurrence of the events, which caused it to lawfully terminate the two employees.

By making this argument, the Respondent essentially attempts to relitigate the lawfulness of its conditioned offers of rehire to Shepard and Belle-Isle. The Respondent, however, cannot relitigate this issue at the compliance stage of the proceeding. *Emsing's Supermarket*, supra, 299 NLRB at 571; *Hiysota Fuel Co.*, supra, 287 NLRB at 3. Apart from this attempt at relitigation of the rehire issue, the Respondent has shown no circumstances that would warrant departure from the use of the *Woolworth* formula.

Moreover, the judge's recommended Order in the underlying case required use of the *Woolworth* formula to calculate backpay, the Board's Order repeated that requirement, and the D.C. Circuit granted enforcement of the Order requiring use of the *Woolworth* formula. Although the Respondent acknowledges that it is the Board's normal practice to apply the *Woolworth* formula, the Respondent did not raise the question of whether the circumstances required a different backpay formula in its exceptions to the judge's decision or before the D.C. Circuit. The Respondent is, therefore, foreclosed, under Section 102.46(b)(2) of the Board's Rules and Regulations,<sup>5</sup> from raising it at the compliance stage of this proceeding. Accordingly, we grant the General Counsel's motion to strike paragraphs 7,8,10,11,12, and 20(c)(i),(ii), and (iii) of the Respondent's answer to the extent that they do not comport with the *Woolworth* formula or the *Woolworth* definition of net interim earnings.

<sup>5</sup> Sec. 102.46(b)(2) provides:

Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

#### IV. THE ASSERTIONS CONCERNING REIMBURSEMENT FOR AND CALCULATION OF MEDICAL PREMIUMS AND EXPENSES

The General Counsel moves to strike paragraph 9 of the Respondent's answer because it denies, without comment, paragraph 9 of the specification, which alleges that Shepard and Belle-Isle are entitled to reimbursement for medical premiums for replacement coverage and for medical expenses to the extent they would have been compensated for such expenses under the Respondent's medical insurance, less amounts paid by any other medical policy under which they had coverage. The General Counsel argues that discriminatees' entitlement to whatever benefits they would have received, absent the discrimination against them, is beyond challenge.

The Board customarily includes reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost. See, e.g. *Cliffstar Transportation Co.*, 311 NLRB 152, 166 (1993), and *Peelle Co.* 291 NLRB 607, 608 (1988). The Respondent's bald denial does not set forth facts that would place paragraph 9 in contention by negating or mitigating its liability for such expenses. Accordingly, we grant the General Counsel's motion to strike paragraph 9 of the Respondent's answer.

The General Counsel also moves to strike paragraph 20(d)(i) of the Respondent's answer insofar as it calls, in the alternative, for excess interim earnings to offset medical insurance and medical expenses. The General Counsel contends that benefits may be offset only by like interim benefits.

The Board has held that benefits received by discriminatees through substitute insurance are a proper offset on a claim against an employer for the same losses. *Cliffstar Transportation Co.*, supra, 311 NLRB at 168. Similarly, copayments of insurance premiums discriminatees would have made, absent discrimination against them, offsets claims for funds expended by discriminatees in securing substitute insurance. *Id.* Thus, the Board generally has offset benefits by like interim benefits. The Respondent has not given sufficient reason to depart from this approach to benefits. Accordingly, we grant the General Counsel's motion to strike the last sentence in paragraph 20(d)(i) of the Respondent's answer.

#### V. THE ASSERTION THAT NO INTEREST SHOULD BE ASSESSED ON BACKPAY AFTER JUNE 30, 1996

In paragraph 20(d)(iii) of the Respondent's answer, it asserts that the Respondent should not be assessed interest on backpay after June 30, 1996, because it promptly furnished all information requested of it by that date and is not responsible for the Regional Office's delay of over

3 years in issuing the specification. The Respondent further asserts that the Supervisory Compliance Officer for Region 1 assured the Respondent's attorney that the Respondent would not have to pay interest on backpay for the delay attributable to the Regional Office. The General Counsel argues that laches is not a defense against the Board in its enforcement of a public right. He therefore moves to strike paragraph 20(d)(iii) of the Respondent's answer.

The equitable defense of laches is generally not available in circumstances, like those presently before us, where public policy requires the vindication of the rights of the employees who have been the targets of an employer's unfair labor practices. See *Urban Laboratories, Inc.*, 308 NLRB 816, 820 (1992), relying on *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264–265 (1969). With respect to the assurance allegedly given to the Respondent's attorney by the Supervisory Compliance Officer for Region 1, the Board has held that it is not bound by advice given to employers by Board agents, especially when employee rights are at stake. *Martel Construction, Inc.*, 311 NLRB 921, 927 (1993), *enfd.* 35 F.3d 571 (9th Cir. 1994). Here, Shepard and Belle-Isle's right to be made whole would be significantly curtailed if interest were not assessed after June 30, 1996. Accordingly, we grant the General Counsel's motion to strike paragraph 20(d)(iii) of the Respondent's answer.

#### VI. THE ASSERTION THAT THE VALUE OF THE HAWAII TRIP SHOULD BE AMORTIZED OVER FOUR CALENDAR QUARTERS

The specification includes the cash value of the 1994 trip to Hawaii sponsored by the Respondent in the gross earnings for Shepard and Belle-Isle. In paragraph 20(d)(iv) of its answer, the Respondent asserts that if the value of the trip to Hawaii is included in the backpay, it should be amortized over the four calendar quarters of the year in which the trip took place. The General Counsel correctly asserts that the Respondent gives no reason why the value of the trip should be amortized. The General Counsel moves to strike this paragraph of the Respondent's answer.

The Board's usual procedure is to determine backpay, including bonuses and benefits such as the Hawaii trip, on a quarterly basis, where earnings in one particular quarter have no effect on the backpay liability for any other quarter. *F. W. Woolworth Co.*, *supra*, 90 NLRB at 293. The Respondent having given no sufficient reason for departure from this procedure, we grant the General

Counsel's motion to strike paragraph 20(d)(iv) of the Respondent's answer.<sup>6</sup>

#### VII. THE RESPONDENT'S REQUEST TO AMEND THE SPECIFICATION

In the Respondent's response to the Notice to Show Cause, it asserts that Region 1 overstated the amount of gross backpay and understated the interim earnings of Shepard and Belle-Isle. The Respondent attached tables setting forth what it contends are the proper backpay figures for Shepard and Belle-Isle. On the basis of these arguments and figures, the Respondent requests that Region 1 be ordered to amend the specification.

The Respondent's alternative figures are sufficiently specific to entitle the Respondent to a hearing on the amounts of gross backpay of Shepard and Belle-Isle. With respect to interim earnings, a general denial is sufficient under the Board's Rules to raise an issue warranting a hearing because that information is generally not within the knowledge of the respondent. *Dews Construction Corp.*, 246 NLRB 945, 947 (1979). In these circumstances, we shall deem the Respondent's arguments and tables to be incorporated into the Respondent's answer to the specification. *Ellis Electric*, *supra*, 321 NLRB at 1206. As the Respondent may litigate these matters at the compliance hearing, we deny the Respondent's motion to order Region 1 to amend the specification.

#### Conclusion

We have stricken certain paragraphs of the Respondent's answer, which directly answered a paragraph of the Compliance Specification. The paragraphs of the specification to which an answer has been stricken are deemed to be admitted to be true pursuant to Section 102.56 (b) and (c)<sup>7</sup> of the Board's Rules and Regulations. Based on what is admitted in the Respondent's answer,

<sup>6</sup> Member Hurtgen would not grant summary judgment as to the issue of whether there is a financial need to amortize the payment of the cash value of the Hawaii trips. In his view, this matter raises factual issues.

<sup>7</sup> See fn. 3 for the text of Sec. 102.56(b). Sec. 102.56(c) provides that:

If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

as further amended in the Respondent's response to the Notice to Show Cause, and what is deemed to be admitted in light of the stricken answers, the Board grants the General Counsel's Motion for Partial Summary Judgment on the following paragraphs of the specification: Paragraphs 1 and 2 concerning the definitions of gross backpay and the appropriate measure of gross earnings with the exception of the cash value of the Hawaii trip; paragraph 5 concerning the annual Christmas bonus in December 1992, 1993, 1994, and 1995; paragraph 6 concerning medical and profit-sharing plans; paragraphs 7 and 8 concerning the definition of calendar quarter net interim earnings and calendar quarter net backpay; paragraph 9 concerning reimbursement of medical expenses and premiums; paragraph 10 concerning the definition of total net backpay; paragraph 11(a) concerning Shepard's backpay period; paragraph 11(b) concerning Shepard's rate of pay; paragraph 12(a) concerning Belle-Isle's backpay period; paragraph 12(b) concerning Belle-Isle's rate of pay; paragraph 14 concerning vesting in the profit-sharing plans; and paragraph 15 concerning performance of investments in the profit-sharing plan.

The General Counsel asserts that summary judgment should also be granted on paragraph 13 concerning the calculation of profit-sharing contributions. However, the Respondent, in its answer admitted only that it had made contributions to its profit-sharing plan each September, through September 1995, based on the earnings of each eligible employee during the preceding calendar year. It denied the specific figures for profit-sharing contributions for Shepard and Belle-Isle and attached figures of its own. By offering these specific alternative figures, the Respondent has met the requirement for a hearing on the profit-sharing contributions for Shepard and Belle-Isle. Accordingly, we deny the General Counsel's Motion for Partial Summary Judgment on paragraph 13 of the specification.

#### ORDER

It is ordered that the General Counsel's motion to strike the following portions of the Respondent's amended answer to the compliance specification is granted: the denial that the Respondent discriminated against Shepard and Belle-Isle, the assertions that backpay to Shepard and Belle-Isle is barred by Section 10(c), the assertions that the *F.W. Woolworth* formula for calculation of backpay is inappropriate, the denial that Shepard and Belle-Isle are entitled to reimbursement for medical premiums replacement coverage and for medical expenses, the assertion that excess interim earnings should offset medical insurance and expenses, the asser-

tion that it should not be assessed interest on backpay after June 30, 1996, and the assertion that the value of the trip to Hawaii should be amortized over the four calendar quarters in which the trip took place.

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted with respect to the definitions of gross backpay and the appropriate measure of gross earnings with the exception of the cash value of the Hawaii trip (pars. 1 and 2); the allegations that Shepard and Belle-Isle were entitled to an annual Christmas bonus in the amount of \$200, \$300, \$400, and \$500 in December 1992, 1993, 1994, and 1995, respectively (par. 5); the allegation that the Respondent maintained medical and profit-sharing plans (par. 6); the definitions of calendar quarter net interim earnings and calendar quarter net backpay (pars. 7 and 8); the allegation that Shepard and Belle-Isle are entitled to reimbursement of medical expenses and premiums (par. 9); the definition of total net backpay (par. 10); the allegation that Shepard's backpay period began on May 29, 1992, and ended on June 5, 1996 (par. 11(a)); the allegation that Shepard's rate of pay immediately prior to her termination amounted to gross earnings of \$1233.85 per pay period (par. 11(b)); the allegation that Belle-Isle's backpay period began on May 29, 1992, and ended on June 5, 1996 (par. 12(a)); the allegation that Belle-Isle's rate of pay prior to her termination amounted to \$944.62 per pay period (par. 12(b)); the allegation that Shepard and Belle-Isle would have been fully vested in the Respondent's profit-sharing plan (par. 14); and the allegation concerning the investments performance of the Respondent's profit-sharing plan for the years 1992-1996 (par. 15).

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 1 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to taking evidence concerning paragraphs of the compliance specification as to which summary judgment has not been granted.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.